
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 26

THE UNITED STATES OF AMERICA, PETITIONER

v8.

WESTINGHOUSE ELECTRIC & MANUFACTURING CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

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1 In United States Circuit Court of Appeals for the
First Circuit

October Term, 1947

No. 4353

UNITED STATES OF AMERICA, PETITIONER, APPELLANT

v.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, APPELLEE

In United States District Court, District of Massachusetts

No. 6669 Misc. Civil.

UNITED STATES, PETITIONER

v.

TWO PARCELS OF LAND, SITUATED IN THE CITY OF SPRINGFIELD,
COUNTY OF HAMPDEN, COMMONWEALTH OF MASSACHUSETTS, AND
HODGES CARPET COMPANY, ET AL., RESPONDENTS

Appeal of the United States, Petitioner from Judgment as to
Parcel "A"

[Entered November 24, 1947]

Petition for condemnation

Filed February 18, 1943

[Memorandum: The schedules attached to Petition for Con-
demnation are here omitted in accordance with Designation.
John A. Canavan, Clerk.]

2 Comes now the United States of America, represented
herein by Edmund J. Brandon, United States Attorney in
and for the District of Massachusetts, and Philip P. A. O'Con-
nell, Special Assistant to the United States Attorney in and for
the said District, acting under instructions of the Attorney Gen-
eral of the United States and at the request of the Secretary of
War of the United States, and respectfully represents to the
Court as follows:

(1) That pursuant to the provisions contained in the Act of
Congress approved August 18, 1890 (26 Stat. 316), as amended
by the Acts of Congress approved July 2, 1917 (40 Stat. 241),
April 11, 1918 (40 Stat. 518; 50 U. S. C. sec. 171); the Act of
Congress approved March 27, 1942, Second War Powers Acts,
Public Law 507—77th Congress, Second Session, and the Act of

Congress approved July 2, 1942 (Public Law 649—77th Congress) and all other Acts or parts of Acts amendatory thereof or supplementary thereto, the Secretary of War of the United States of America has been authorized and empowered to acquire by condemnation the land hereinafter described for use in connection with storage facilities and for other related military purposes in that part of Springfield known as Indian Orchard, Massachusetts;

(2) That this proceeding is instituted by direction of the Attorney General of the United States at the request of the Secretary of War of the United States.

(3) That the interest to be acquired is a term for years ending June 30, 1943, subject to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, said term being renewable for additional yearly periods during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of
3 notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof;

(4) That for use in connection with the aforesaid purposes, the Secretary of War of the United States of America has determined it is necessary and advantageous to the United States of America to acquire the lands or interests therein and all improvements thereon and all rights thereunto appertaining by condemnation under judicial process; and all preliminary and administrative steps required by law have been taken;

(5) That the lands or interests therein sought to be condemned are shown on a plan marked Schedule "B" and more particularly described in Schedule "A", both of which are attached hereto and made a part hereof;

(6) That according to the land records of the County of Hampden and other evidence presently available to your petitioner, it appears that title to the lands hereinafter described together with all improvements therein, is now vested in those persons, firms or corporations set out in Schedule "C", attached hereto and made a part hereof;

(7) That in addition to the persons named, there are or may be other persons, firms or corporations, whose names are unknown to petitioner who have or who may claim to have some interest in the property hereinafter described or who may claim to be entitled to compensation with respect to the taking thereof, and petitioner, therefore, makes parties defendant hereto all persons, firms and corporations, known and unknown, who have, or who may claim to have any right, title, interest or estate in, or lien, encumbrance, servitude, easement, demand or claim on or in respect of the hereinafter described premises;

4 (8) The attorneys for the petitioner herein further respectfully represent to the Court that the Secretary of War of the United States of America has determined that it is necessary to take immediate possession of certain real property herein described: that under the provisions of the Act of Congress approved March 27, 1942 (Public Law 507—77th Congress) and all other Acts or parts of Acts amendatory thereof or supplementary thereto, the United States of America has the right to take immediate possession of any lands, easements or rights of way needed for use in connection with the aforesaid purposes duly authorized by Congress to the extent of the interest to be acquired by the United States, and proceed with such military purposes thereon as have been authorized by Congress. PROVIDED, however, that certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States of America or by the deposit of monies or other form of securities in such amount and form as shall be approved by the Court in which such proceedings shall be instituted;

(9) The attorneys for the petitioner herein further respectfully represent that certain and adequate provision has been made for the payment of just compensation to the party or parties entitled thereto by the Act of Congress approved July 2, 1942 (Public Law 649—77th Congress), which Act appropriated funds for such purposes:

5 And your petitioner prays that notice, as required by law, be duly issued to the defendants herein and that such notice shall require all persons interested in said lands, or any of them, to come forward and file any opposition, if any they have, to the proposed condemnation of said lands or interests therein: and to set forth the nature and extent of their several ownerships, claims, titles, estates, rights or liens, if any, and that they be adjudicated and forever determined and concluded thereby and that the compensation for damages for the taking of the said lands and interests therein to be herein condemned be ascertained according to law, and the parties entitled to the sum awarded as just compensation for the taking of the said lands with any and all improvements thereon be determined and upon payment to or into the registry of the Court for the use of the parties entitled, of the sum adjudged to be just compensation for the land condemned, that it be adjudged and decreed that a term for years ending June 30, 1943, said term being renewable for additional yearly periods during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof in the said

lands or interests therein and all improvements thereon and all rights thereunto appertaining, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, is vested in the United States of America, and to grant such other and further relief as may be lawful and proper.

And it is further prayed that an order be entered in this cause providing, authorizing and directing the United States of America, the petitioner herein, to take immediate possession of each and all of the lands and various interests therein to as hereinafter more particularly set forth.

UNITED STATES OF AMERICA,

EDMUND J. BRANDON,

United States Attorney.

By PHILIP P. A. O'CONNELL,

Special Assistant to the United States Attorney.

In United States District Court

Order of court for possession

February 18, 1943

[Memorandum: The schedule attached to Order of court for possession is here omitted in accordance with Designation. John A. Canavan, Clerk.]

WYZANSKI, J. This cause coming on to be heard at this term of Court upon the duly executed Petition for Condemnation, filed herein on the 18th day of February, 1943, and the further prayer therein contained of the petitioner, the United States of America, to enter an order providing for the fixing of the date when possession of the property therein described is to be surrendered to the United States of America, said petition having been duly read and upon consideration thereof and of said motion and the statutes in such case made and provided, and by authority thereof, it is by the District Court of the United States of America for the District of Massachusetts, this 18th day of February, 1943, ordered and adjudged:

That adequate provision having been made for the payment of just compensation for the land and interests therein to be condemned in this proceeding by the provisions of existing legislation, which said lands and interests therein are shown on a map marked Schedule "B" attached to and made a part of Petition for Condemnation filed herein and are more particularly described in Schedule "A" attached hereto and made a part hereof. The Secretary of War of the United States of America be and he hereby

is authorized to take immediate possession of the said lands and all improvements thereon and all right thereunto appertaining subject, however, to existing easements for public roads and highways, for public utilities, for railroads, and for pipe lines, as prayed for in the Petition for Condemnation hereinabove referred to and to proceed with such public works thereon as have been authorized by law and as are set forth in the petition for condemnation; that possession of the above-described property shall be surrendered to the United States of America and its duly authorized agents forthwith as have been authorized by law and as are set forth in the Petition for Condemnation;

It is further ordered that the United States Marshal be and he is hereby directed and instructed forthwith to serve an attested copy of this order, said service to be made in any one of the following ways:

- (a) By posting a copy of this order on the premises;
- (b) By serving a copy of this order upon any person of suitable age and discretion in possession thereof;
- (c) By personal service of a copy of this order on the owners of record of said premises as of the time of the filing of the Petition for Condemnation this proceeding; and forthwith make due return of said service to the Court.

This cause is held open for such other and further orders and judgments as may be just and equitable in the premises.

By the Court:

MARY G. TRAVERSE,
Deputy Clerk.

Entered: 2/18/43.

CHARLES E. WYZANSKI, Jr., J.

In United States District Court

Declaration of taking

Filed April 16, 1943

[Memorandum: The schedules attached to Declaration of taking are here omitted in accordance with Designation. John A. Canavan, Clerk.]

I, Henry L. Stimson, Secretary of War of the United States, do hereby declare that:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40

Stat. 518; 50 U. S. C. sec. 171); the Act of Congress approved March 27, 1942 (Public Law 507—77th Congress), which acts authorize the acquisition of land for military or other war purposes, and the Act of Congress approved July 2, 1942 (Public Law 649—77th Congress), which act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for storage facilities for the Army Air Forces, and uses incident thereto. The said lands have been selected by me for acquisition by the United States for use in connection with the establishment of the Storage Depot for the Army Air Forces at Springfield, Massachusetts, and for such other uses as may be authorized by Congress or by Executive Order, and are required for immediate use.

2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof, and is a description of the same lands described in the petition in the above-entitled cause.

3. The estate taken for said public uses is a term for years ending June 30, 1943, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, said term for years being renewable for additional yearly periods during the existing National Emergency, at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof. Said

term for years is further subject to the right of the owner to pass and repass to and from the buildings excepted from this taking as set forth in Schedule A. The United States reserves to itself, upon the termination of said term or subsequent extensions thereof, the right to remove improvements made to the land by the United States, including personal property and fixtures constructed thereon or affixed thereto.

4. A plan showing the land taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said lands, with all buildings and improvements thereon and all appurtenances thereto, and including any and all interests hereby taken in said lands, for the term ending June 30, 1943, is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the Registry of said Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor.

In witness whereof, the petitioner, by its Secretary of War, thereunto authorized, has caused this declaration to be signed in

its name by said Henry L. Stimson, Secretary of War, this the 13th day of April A. D., 1943, in the City of Washington, District of Columbia.

HENRY L. STIMSON,

Secretary of War of the United States.

In United States District Court

Judgment on the declaration of taking

April 16, 1943

[Memorandum: The schedules attached to Judgment on Declaration of taking are here omitted in accordance with Designation. John A. Canavan, Clerk.]

10 HEALEY, J. This cause coming on for hearing upon motion of Edmund J. Brandon, United States Attorney in and for the District of Massachusetts, and Philip P. A. O'Connell, Special Assistant to the United States Attorney in and for the said District, attorneys for the petitioner herein, to enter a judgment on the declaration of taking filed herein and for an order fixing the date for the surrender of possession of the land herein described to the petitioner, and upon consideration thereof and of the petition and declaration of taking filed herein and the statutes in such case made and provided, and it appearing to the satisfaction of the Court:

First, that the United States of America is entitled to acquire property by condemnation under judicial process for the purposes as set forth and prayed in said petition:

Second, that the declaration of taking filed herein contains, or has annexed thereto a statement of the authority under which and the public use for which the lands hereinafter described are taken, a description of the said lands taken sufficient for the identification thereof, a statement of the estate or interest taken for the said public use, a plan showing the lands taken, and a statement of the sum of money estimated by the Secretary of War to be just compensation for the interest in the land taken for a period beginning February 18, 1948 and including June 30, 1943, in the total sum of \$15,192.43, and that said amount has been deposited into the registry of this Court for the use and benefit of the persons entitled thereto:

Third, that the said declaration of taking filed herein contains a statement that the Secretary of War, the head of the acquiring agency, is of the opinion that the ultimate award of just compensation will be within the limits prescribed by Congress as the price to be paid therefor:

Now, therefore, it is ordered, adjudged and decreed that a term for years, in the land hereinafter described in Schedule "A" attached hereto and made a part hereof, ending June 30, 1943, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, said term for years being renewable for additional yearly periods during the existing National Emergency, at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof. Said term for years is further subject to the right of the owner to pass and repass to and from the buildings excepted from the taking as set forth in said Schedule "A". The United States reserved to itself, upon the termination of said term or subsequent extensions thereof, the right to remove improvements made to the land by the United States, including personal property and fixtures constructed thereon or affixed thereto, vested in the United States of America upon the filing of said declaration of taking and the depositing in the registry of this Court of the amount of estimated just compensation, which land is situate in the City of Springfield, County of Hampden, Commonwealth of Massachusetts, and more particularly described in said Schedule "A", and that said land is deemed to be condemned and taken for the United States of America and the right to just compensation for the property so taken is vested in the persons entitled thereto; and the amount of such just compensation shall be ascertained and awarded in this proceeding and established by judgment herein pursuant to law, and

This cause is held open for such further and other orders, judgments, and decrees as may be necessary in the premises.

By the Court :

JOSEPH J. DUWAN, *Deputy Clerk.*

Entered : April 16, 1943.

ARTHUR D. HEALEY, *J.*

12 In United States District Court

Amended petition for condemnation

Filed April 19, 1943

[Memorandum: The schedules attached to Amended petition for condemnation are here omitted in accordance with Designation. John A. Canavan, Clerk.]

Comes now the United States of America, represented herein by Edmund J. Brandon, United States Attorney in and for the District of Massachusetts, and Philip P. A. O'Connell, Special

Assistant to the United States Attorney in and for the said District, acting under instructions of the Attorney General of the United States and at the request of the Secretary of War of the United States, and respectfully represents to the Court as follows:

(1) That pursuant to the provisions contained in the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518; 50 U. S. C. sec. 171); the Act of Congress approved March 27, 1942, Second War Powers Acts, Public Law 507—77th Congress, Second Session, and the Act of Congress approved July 2, 1942 (Public Law 649—77th Congress) and the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. sec. 258a), and all other Acts or parts of Acts amendatory thereof or supplementary thereto, the Secretary of War of the United States of America has been authorized and empowered to acquire by condemnation the land hereinafter described for use in connection with storage facilities and for other related military purposes in that part of Springfield known as Indian Orchard, Massachusetts;

(2) That this proceeding is instituted by direction of the Attorney General of the United States at the request of the Secretary of War of the United States.

(3) That the interest to be acquired is a term for years 13 ending June 30, 1943, subject to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, said term being renewable for additional yearly periods during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof. Said term for years is further subject to the right of the owner to pass and repass to and from the buildings excepted from this taking, as set forth in said Schedule "A". The United States reserves to itself, upon the termination of said term or subsequent extensions thereof, the right to remove improvements made to the land by the United States, including personal property and fixtures constructed thereon or affixed thereto;

(4) That for use in connection with the aforesaid purposes, the Secretary of War of the United States of America has determined it is necessary and advantageous to the United States of America to acquire the lands or interests therein and all improvements thereon and all rights thereunto appertaining by condemnation under judicial process, and all preliminary and administrative steps required by law have been taken;

(5) That the lands or interests therein sought to be condemned are shown on a plan marked Schedule "B" and more particularly

described in Schedule "A", both of which are attached hereto and made a part hereof:

(6) That according to the land records of the county of Hampden and other evidence presently available to your petitioner, it appears that title to the lands hereinafter described together with all improvements thereon, is now vested in those persons, firms or corporations set out in Schedule "C" attached hereto and made a part hereof;

14 (7) That in addition to the persons named, there are or may be other persons, firms or corporations, whose names are unknown to petitioner who have or who may claim to have some interest in the property hereinafter described or who may claim to be entitled to compensation with respect to the taking thereof, and petitioner, therefore, makes parties defendant hereto all persons, firms and corporations, known and unknown, who have, or who may claim to have any right, title, interest or estate in, or lien, encumbrance, servitude, easement, demand or claim on or in respect, of the hereinafter described premises;

(8) The attorneys for the petitioner herein further respectfully represent to the Court that the Secretary of War of the United States of America has determined that it is necessary to take immediate possession of certain real property herein described; that under the provisions of the Act of Congress approved March 27, 1942 (Public Law 507—77th Congress) and all other Acts or parts of Acts amendatory thereof or supplementary thereto, the United States of America has the right to take immediate possession of any lands, easements, or rights of way needed for use in connection with the aforesaid purposes duly authorized by Congress to the extent of the interest to be acquired by the United States, and proceed with such military purposes thereon as have been authorized by Congress, Provided, however, that certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States of America or by the deposit of monies or other form of security in such amount and form as shall be approved by the court in which such proceedings shall be instituted;

(9) The attorneys for the petitioner herein further respectfully represent that certain and adequate provision has been made for the payment of just compensation to the party or parties entitled thereto by the Act of Congress approved July 2, 1942 (Public Law 649—77th Congress), which Act appropriated funds for such purposes:

And your petitioner prays that notice, as required by law, be duly issued to the defendants herein and that such notice shall require all persons interested in said lands, or any of them, to come

forward and file any opposition, if any they have, to the proposed condemnation of said lands or interests therein; and to set forth the nature and extent of their several ownerships, claims, titles, estates, rights or liens, if any, and that they be adjudicated and forever determined and concluded thereby and that the compensation for damages for the taking of the said lands and interests therein to be herein condemned be ascertained according to law, and the parties entitled to the sum awarded as just compensation for the taking of the said lands with any and all improvements thereon be determined and upon payment to or into the registry of the Court for the use of the parties entitled, of the sum adjudged to be just compensation for the land condemned, that it be adjudged and decreed that a term for years ending June 30, 1943, said term being renewable for additional yearly periods during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof in the said lands or interests therein and all improvements thereon and all rights thereunto appertaining, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, is vested in the United States of America, and to grant such other and further relief as may be lawful and proper.

And it is further prayed that an order be entered in this cause, providing, authorizing and directing the United States of America, the petitioner herein, to take immediate possession of each and all of the lands and various interests therein to as hereinafter more particularly set forth.

UNITED STATES OF AMERICA,

EDMUND J. BRANDON,

United States Attorney.

By PHILIP P. A. O'CONNELL,

Special Assistant to the United States Attorney.

[Duly sworn to by Philip P. A. O'Connell; jurat omitted in printing.]

In United States District Court

Election to extend term for years

Filed May 1, 1943

Notice is hereby given that the Secretary of War of the United States of America has elected to extend the term for years heretofore acquired, expiring June 30, 1943, in the land and improvements thereon described in Amended Petition for Condemnation and Declaration of Taking filed in these proceedings, and Judgement on Declaration of Taking entered thereon, to June 30, 1944.

The aforesaid extensions is subject to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, said term being renewable for additional yearly periods during the existing National Emergency, at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the extension of the term hereby taken or subsequent extensions thereof. Said term for years is further subject to the right of the owner to pass and repass to and from the buildings excepted from this taking as set forth in Schedule "A" attached to and made a part of said Amended Petition for Condemnation, Declaration of Taking and Judgment on Declaration of Taking. The United States of America reserves to itself, upon the termination of said extension of term or subsequent extensions thereof, the right to remove improvements made to the land by the United States, including personal property and fixtures constructed thereon or affixed thereto.

UNITED STATES OF AMERICA,
EDMUND J. BRANDON,
United States Attorney.

By PHILIP P. A. O'CONNELL,
Special Assistant to the United States Attorney.

In United States District Court

Supplemental declaration of taking

Filed August 23, 1943

[Memorandum: The schedule attached to Supplemental declaration of Taking is here omitted in accordance with Designation. John A. Canavan, Clerk.]

Whereas, I have elected to extend the term which was condemned in this proceeding for an additional term of one
18 year commencing July 1, 1943, and ending June 30, 1944;
and

Whereas, the sum estimated to be just compensation for the taking of said extension term of one year is not included in the monies heretofore deposited with this court in this proceeding.

Now, therefore, I, Robert P. Patterson, Acting Secretary of War of the United States, acting pursuant to the powers and authorities recited in the petition and declaration of taking on file in this proceeding, do estimate the just compensation for the taking of the property described in this proceeding for the extension term of one year, commencing July 1, 1943 and ending June 30, 1944, to be \$52,671.60, which sum I cause to be deposited herewith in the registry of this Honorable Court for the use and benefit of the persons entitled thereto. The allocation of said

sum to the various tracts of land involved in the proceeding is set forth in Schedule "A", attached hereto and made a part hereof. I am of the opinion that the ultimate award for said extension term will probably be within any limits prescribed by law as the price to be paid therefor.

In witness whereof, the petitioner by its Acting Secretary of War thereunto authorized has caused this supplemental declaration of taking to be signed in its name and on its behalf by said Acting Secretary of War this the 26th day of July 1943, in the City of Washington, District of Columbia.

ROBERT P. PATTERSON,
Acting Secretary of War of the United States.

In United States District Court

Judgment on declaration of taking as supplemented nunc pro tunc

October 22, 1943

19 WYZANSKI, J. This cause coming on for hearing upon motion of Edmund J. Brandon, United States Attorney in and for the District of Massachusetts, and Philip P. A. O'Connell, Special Assistant to the United States Attorney in and for the said District, attorneys for the petitioner herein, to enter a judgment on the declaration of taking and supplemental declaration of taking in connection therewith, filed herein, and upon consideration thereof and of the statutes in such case made and provided, and it appearing to the satisfaction of the Court:

First, that the United States of America is entitled to acquire property by condemnation under judicial process for the purposes as set forth and prayed for in said petition:

Second, that the Declaration of Taking and the Supplemental Declaration of Taking filed herein contains or has annexed thereto a statement of the authority under which and the public use for which the interest in the lands hereinafter described are taken, a description of the said lands sufficient for the identification thereof, a statement of the estate or interest taken for the said public use, a plan showing the lands taken, and a statement of the sum of money estimated by the Secretary of War of the United States to be just compensation for the land or interests in the lands described in the Declaration of Taking, ending June 30, 1944, in the total sum of \$71,864.03 for the period beginning February 18, 1943 to and including June 30, 1944, and that said amount has been deposited into the Registry of this Court, allocations of which amount appear in Schedule "A" attached to original and

supplemental Declarations of Taking filed herein, for the use and benefit of the persons entitled thereto;

Third, that said Declaration of Taking and Supplemental Declaration of Taking filed herein contain statements that the Secretary of War, the head of the acquiring agency, is of the
20 opinion that the ultimate award of just compensation for the interest acquired under the Declaration of Taking and the extension of the same in Supplemental Declaration of Taking will be within the limits prescribed by Congress as the price to be paid therefor;

Now, therefore, it is ordered, adjudged, and decreed that a term for years in the lands described in Schedule "A" attached to and made a part of Declaration of Taking herein filed, ending June 30, 1944, subject to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, said term for years being renewable for additional yearly periods during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof. Said term for years is further subject to the right of the owner to pass and repass to and from the buildings excepted from the taking as set forth in said Schedule "A". The United States reserves to itself upon the termination of said term or subsequent extension thereof, the right to remove improvements made to the land by the United States including personal property and fixtures constructed thereon or affixed thereto, vested in the United States of America upon the filing of said Declaration of Taking and Supplemental Declaration of Taking and the depositing of the amounts of estimated just compensation in the Registry of this Court, which lands are situate in the City of Springfield, County of Hampden, and Commonwealth of Massachusetts, as shown on a map marked Schedule "B", and more particularly described in Sechedule "A", both of which are attached to and made a part of Declaration of Taking herein filed, and that a term for years in said land together with the improvements thereon expiring June 30, 1944, subject to the
foregoing rights and easements is deemed to be condemned
21 and taken for the United States of America, and the right to just compensation for the interest in the property so taken is vested in the persons entitled thereto; and the amount of such just compensation shall be ascertained and awarded in this proceeding, and established by judgment herein pursuant to law.

This cause is held open for such further and other orders, decrees and judgments as may be necessary in the premises.

By the Court:

MARY G. TRAVERSE,
Deputy Clerk.

Entered:

CHARLES E. WYZANSKI, Jr., J.

10/22/43 4:55 P. M.

In United States District Court

Election to extend term for years

Filed May 25, 1944

Pursuant to Section 3 of the Petition for Condemnation filed herein, the United States of America, acting through the Secretary of War, has elected to extend the term for years heretofore acquired, expiring June 30, 1944 in the land and improvements thereon, which lands are more particularly described in Schedule "A" attached to and made a part of Petition for Condemnation and Declaration of Taking herein filed, and in Judgment on Declaration of Taking heretofore entered, for an additional year expiring June 30, 1945, inclusive.

The aforesaid extension is subject to all the conditions set out in the Petition for Condemnation heretofore filed in this proceeding.

UNITED STATES OF AMERICA,
EDMUND J. BRANDON,
United States Attorney.

By PHILIP P. A. O'CONNELL,
Special Assistant to the United States Attorney.

22 In United States District Court

Supplemental declaration of taking

Filed August 2, 1944

[Memorandum: The schedule attached to Supplemental declaration of taking is here omitted in accordance with Designation. John A. Canavan, Clerk.]

To the Honorable, the United States District Court:

Whereas, I have elected to extend the term for years which was condemned in this proceeding for an additional term of one year, commencing July 1, 1944, and ending June 30, 1945; and

Whereas, the sum estimated to be just compensation for the

taking of said extension term of one year is not included in the monies heretofore deposited with this Court in this proceeding.

Now, therefore, I, Robert P. Patterson, Acting Secretary of War of the United States, acting pursuant to the powers and authorities recited in the petition and declaration of taking on file in this proceeding, do estimate the just compensation for the taking of the property described in this proceeding for the extension term of one year, commencing July 1, 1944, and ending June 30, 1945, to be \$52,671.60, which sum I cause to be deposited herewith in the Registry of this Honorable Court for the use and benefit of the persons entitled thereto. The allocation of said sum to the various tracts of land involved in the proceeding, is set forth in Schedule "A", attached hereto, and made a part hereof. I am of the opinion that the ultimate award for said extension term will probably be within any limits prescribed by law as the price to be paid therefor.

In witness whereof, the petitioner, by its Acting Secretary of War, thereunto authorized, has caused this supplemental declaration of taking to be signed in its name and on its behalf
 23 by said Acting Secretary of War, this the 8th day of July
 A. D. 1944, in the City of Washington, District of
 Columbia.

ROBERT P. PATTERSON,
Acting Secretary of War of the United States.

In-United States District Court

Judgment on declaration of taking as amended and supplemented

August 2, 1944

SWEENEY, J. This cause coming on for hearing upon motion of Edmund J. Brandon, United States Attorney in and for the District of Massachusetts, and Philip P. A. O'Connell, Special Assistant to the United States Attorney in and for the said District, attorneys for the petitioner herein, to enter a judgment on the Declaration of Taking as Supplemented and Amended filed in connection therewith on the 2nd day of August 1944, and upon consideration thereof and of the statutes in such case made and provided, and it appearing to the satisfaction of the Court:

First, that the United States of America is entitled to acquire property by condemnation under judicial process for the purposes as set forth and prayed for in said petition:

Second, that the Declaration of Taking as Supplemented and Amended, both of which are filed herein, contains or has annexed thereto a statement of the authority under which and the public use for which the interest in the lands hereinafter described are

taken, a description of the said lands sufficient for the identification thereof, a statement of the estate or interest taken for the said public use, a plan showing the lands taken, and a statement of the sum of money estimated by the Secretary of War of the United States to be just compensation for the land or interests in the lands described in the Declaration of Taking, in the
 24 total sum of \$52,671.60 for the period beginning July 1, 1944 and ending June 30, 1945, and that said amount has been deposited into the Registry of this Court, allocations of which amount appear in Schedule "A" attached to original and supplemental Declarations of Taking filed herein, for the use and benefit of the persons entitled thereto;

Third, that said Declaration of Taking and Amended and Supplemental Declarations of Taking filed herein contain statements that the Secretary of War, the head of the acquiring agency, is of the opinion that the ultimate award of just compensation for the interest acquired under the Declaration of Taking and the extensions of the same in Supplemental Declaration of Taking will be within the limits prescribed by Congress as the price to be paid therefor;

Now, therefore, it is ordered, adjudged and decreed that a term for years in the lands described in Schedule "A" attached to and made a part of Declaration of Taking herein filed, ending June 30, 1945, subject to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, said term for years being renewable for additional yearly periods during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof. Said term for years is further subject to the right of the owner to pass and repass to and from the buildings excepted from the taking as set forth in said Schedule "A". The United States reserves to itself upon the termination of said term or subsequent extensions thereof, the right to remove improvements made to the land by the United States including personal property and fixtures constructed thereon or affixed thereto, vested in the United States of America upon the
 25 filing of said Declaration of Taking and Supplemental and Amended Declarations of Taking and the depositing of the amounts of estimated just compensation in the Registry of this Court, which lands are situate in the city of Springfield, County of Hampden, and Commonwealth of Massachusetts, as shown on a map marked Schedule "B", and more particularly described in Schedule "A", both of which are attached to and made a part of Declaration of Taking herein filed, and that a term for years in said land together with the improvements thereon

expiring June 30, 1945, subject to the foregoing rights and easements is deemed to be condemned and taken for the United States of America, and the right to just compensation for the interest in the property so taken is vested in the persons entitled thereto; and the amount of such just compensation shall be ascertained and awarded in this proceeding, and established by judgment herein pursuant to law.

This cause is held open for such further and other orders, decrees and judgments as may be necessary in the premises.

By the Court:

Entered:

JANE D. FAHEY,
Deputy Clerk.
GEO. C. SWEENEY, J.

8-2-44.

Schedule "A"

PARCEL A

A certain parcel of land located on the northerly side of Quinnehtuck Canal, so-called, situated in that part of Springfield known as Indian Orchard, County of Hampden and Commonwealth of Massachusetts, more particularly bounded and described as follows:

Beginning at a stone bound located on the northerly side of said Canal, said stone bound being in line 10 feet south and 30 feet east from the southeasterly corner of Mill Building #6; 26 thence turning and running S 65°20'30" W along a line 10 feet distant southerly from and parallel to the southerly sides of Mill Buildings #6, #1 and #2 for a distance of 632.31 feet, more or less, to a stone bound, thence turning and running N 37° W along the easterly boundary line of land now or formerly belonging to the Indian Orchard Company for a distance of 341.09 feet, more or less, to a point located 10 feet distant in a southerly direction from the southerly side of Mill Building #16; thence turning and running in a northeasterly direction and at right angles to the last mentioned course for a distance of 33 feet, more or less; thence turning and running in a northwesterly direction and at right angles to the last mentioned course for a distance of 42 feet, more or less; thence turning and running in a southwesterly direction and at right angles to the last mentioned course for a distance of 33 feet, more or less, to a point located on the easterly boundary line of land belonging to said Indian Orchard Company; thence turning and running N 24°37' W along said easterly boundary line for a distance of 23 feet, more or less, to a point located on the M. H. W. line of the Chicopee River; thence following the M. H. W. line of said Chicopee River by the following courses and distances: N 70°6'30" E 144.39 feet;

N $72^{\circ}11'$ E 146.78 feet; S $78^{\circ}13'$ E 94.52 feet; S $73^{\circ}31'$ E 84.48 feet; S $86^{\circ}45'$ E 54.06 feet; S $70^{\circ}23'$ E 48.34 feet; S $78^{\circ}54'$ E 181.57 feet to a point on the westerly line of land now or formerly belonging to the Quinnehtuck Company; thence turning and running along said westerly boundary line S $29^{\circ}45'30''$ W for a distance of 23.41 feet, more or less, to a stone bound; thence continuing along said westerly boundary line S $24^{\circ}37'$ E for 27 a distance of 91.35 feet, more or less, to the point or place of beginning.

Containing 4.2 acres, more or less.

PARCEL "B"

DESCRIPTION

A certain parcel of land located on the southerly side of Quinnehtuck Canal, so-called, situated in that part of Springfield, known as Indian Orchard, County of Hampden, and the Commonwealth of Massachusetts, more particularly bounded and described as follows:

Beginning at a point in the line of a fence 30 feet, more or less, in a Northeasterly direction from the extreme Southeasterly corner of an office building known as Office No. 2; thence running Northwesterly 37 feet, more or less, to a point on the Southerly line of aforesaid Quinnehtuck Canal, last described line being at right angles to said Southerly side line of canal; thence running Northeasterly along said Southerly side line of canal, 314 feet, more or less, to a point; thence turning an angle of 90 degrees with the last-mentioned line and running Southeasterly 55 feet, more or less, to a fence; thence Southwesterly and parallel to said canal along said fence, a distance of 64 feet, more or less, to an angle; thence Northwesterly along said fence 21 feet, more or less, to an angle; thence Southwesterly and parallel to said canal along said fence in part, and in part along the South wall of storehouses 3 and 4, a distance of 120 feet, more or less, to the Southwesterly corner of Storehouse No. 4; thence Northwesterly at right angles to last-mentioned line, a distance of 4 feet, more or less, to a fence; thence Southwesterly along said fence, and parallel to said canal a distance of 115 feet, more or less, to the point of beginning.

28 Containing .299 of an acre, more or less.

Together with the right to use the Railroad spur track which is contiguous to Buildings Nos. 3 and 4, located on the above-described land. The spur track is on the Southerly side of said Buildings Nos. 3 and 4, and connects with the Athol branch of the Boston & Albany Railroad.

In United States District Court

Stipulation of agreed facts and issues of law

Filed May 27, 1947

AGREED FACTS

This stipulation made and entered into by and between the United States of America, the Hodges Carpet Company, a corporation, and the Westinghouse Electric Corporation, by their respective counsel of record;

Witnesseth: that for the purposes of this case it is agreed as follows:

1. That in the above-captioned proceeding, the United States of America, in the exercise of its right of eminent domain, instituted a proceeding for the condemnation of the use and occupancy of the subject land contained in this proceeding for a term for years ending June 30, 1943, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, said term for years being renewable for additional yearly periods during the existing national emergency, at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof, by the filing of a Petition for Condemnation on the 18th day of February, 1943, at which time possession of said property was awarded to the petitioner. Thereafter, on April 16, 1943, a Declaration of Taking was filed, Judgment entered thereon, and the sum of Eighteen Thousand, Six Hundred Fifty Four and 58/100 Dollars (\$18,654.58) deposited into the Registry of the Court as estimated just compensation for the term extending from February 18, 1943 to June 30, 1943.

2. Thereafter, on May 1, 1943, and May 25, 1944, upon the exercise of the right of renewal of the term by the Secretary of War, the United States extended the term for two additional yearly periods ending June 30, 1944, and June 30, 1945, respectively, and deposited the sum of Fifty One Thousand, One Hundred Ninety Five and 60/100 Dollars (\$51,195.60) as estimated just compensation for each of the respective yearly extensions.

3. That, at the time of the taking, the Hodges Carpet Company was the owner in fee simple of the subject property, and the Westinghouse Electric Corporation a lessee of a portion thereof, occupying under a lease dated January 19, 1942, for a term expiring October 30, 1944, copy of which lease is attached hereto and made a part of this stipulation.

4. That in order to surrender possession of the subject property to the United States, in compliance with the Order of immediate

possession entered by the Court on February 18, 1943, the Westinghouse Electric Corporation, lessee, was required to, and did, remove therefrom FORTHWITH and in so doing incurred certain costs and expenses of removal of its personal property aggregating the sum of Twenty Five Thousand, Six Hundred and 00/100 Dollars (\$25,600.00) which it is agreed represents the full and complete claim for compensation of said lessee against the United States of America on behalf of, or arising under the lease of the Westinghouse Electric Corporation.

5. Had the parties proceeded to formal trial before a jury, witnesses for Westinghouse Electric Corporation would testify
30 that Westinghouse Electric Corporation actually expended Twenty Five Thousand, Six Hundred and 00/100 Dollars (\$25,600.00) for the cost and expenses of labor, material, and transportation in moving its property from the location in question to a new location; that said expense was a necessary expenditure; that the amount expended was a fair and reasonable sum for such removal; that as of February 18, 1942 the market rental value of so much of the building in question as was occupied by the Westinghouse Electric Corporation as a lessee, on a sublease which would be given by it as long-term tenant to a temporary occupier over and above the rent reserved under its lease, was the sum of Twenty Five Thousand, Six Hundred and 00/100 Dollars (\$25,600.00), being its removal cost to make the property available to the temporary occupier; and that said sum was the value of the occupancy of Westinghouse Electric Corporation under its said lease. However, the admissibility of such evidence is not conceded and thereby reserved for the determination of the Court.

6. That the deposit made by the government represents the fair market rental value of the bare unheated warehouse space taken and, if upon the facts and evidence agreed, if admissible, Westinghouse Electric Corporation is entitled to recover for the loss of its right to occupy under its lease as a matter of law, then a finding should be entered determining the just compensation to be in the sum of One Hundred Forty Six Thousand, Six Hundred Forty Five and 78/100 Dollars (\$146,645.78), inclusive of interest, and an order be entered disbursing the sum of Twenty Five Thousand, Six Hundred and 00/100 Dollars (\$25,600.00) to Westinghouse Electric Corporation, and the sum of One Hundred Twenty One Thousand, Forty Five and 78/100 Dollars (\$121,045.78), being the total amount of the deposits, to Hodges Carpet Company. In

the event, as a matter of law, the Westinghouse Electric
31 Corporation is not entitled to recover, then a finding should be entered determining the just compensation to be in the sum of One Hundred Twenty One Thousand, Forty Five and 78/100 Dollars (\$121,045.78), inclusive of interest, the said amount

of the deposit, and that an order for distribution be immediately entered ordering disbursement of the aforesaid amount of One Hundred Twenty One Thousand, Forty Five and 78/100 Dollars (\$121,045.78) heretofore deposited, less prior disbursements, to the Hodges Carpet Company. By this stipulation, Westinghouse Electric Corporation waives any claim in these proceedings against Hodges Carpet Company and the United States of America other than the aforesaid claim for Twenty Five Thousand, Six Hundred and 00/100 Dollars (\$25,600.00) against the United States of America.

Issue of law

In view of the foregoing stipulation of agreed facts, it is considered that no factual matters remain to be determined, and that the sole issue of law before the Court is as follows:—

1. Is Westinghouse Electric Corporation entitled to recover from the United States of America the sum of Twenty Five Thousand, Six Hundred and 00/100 Dollars (\$25,600.00) as the value of its occupancy under the lease upon the foregoing facts and evidence?

UNITED STATES OF AMERICA,
WILLIAM T. MCCARTHY,

United States Attorney.

By PHILIP P. A. O'CONNELL,
Special Assistant to the United States Attorney.

By CHARLES M. IRELAN,
Attorney, Department of Justice.

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HODGES CARPET COMPANY,
HAROLD SUIGER;

By SUIGER, STONEMAN & KURLAND,

Its Attorney.

WESTINGHOUSE ELECTRIC CORPORATION,
By MILTON DONOVAN, *Its Attorney.*

Dated this 27th day of May 1947.

Lease

This indenture, made the 19th day of January, in the year of our Lord one thousand nine hundred and forty-two (1942).

Witness, that Hodges Carpet Company, of Springfield, Massachusetts, hereinafter referred to as Lessor, does hereby lease, demise, and let unto Westinghouse Electric & Manufacturing Company, hereinafter referred to as Lessee, all those certain premises constituting the first floor of #1 Mill and the first floor of #2 Mill, being a total of thirty thousand (30,000) square feet and the

second floor of #1 Mill and the second floor of #2 Mill being an additional thirty thousand (30,000) square feet this latter space to become a part of this lease on January 15, 1942, in the Hodges Carpet Company Plant in the City of Springfield, Massachusetts.

To have and to hold for the term of three (3) years commencing on November 1, 1941 and ending on January 15th, 1942 for 30,000 square feet and beginning on January 16th and ending on October 31, 1944 for 60,000 square feet and yielding and paying, therefore, the rent of twenty-five cents (25¢) per square foot per year making a total rent of Forty Three Thousand, Four Hundred and Thirty Seven Dollars and Fifty Cents (\$43,437.50) for the said period of three years.

33 And the said Lessee does promise to pay to the Lessor and to the Reconstruction Finance Corporation the said rent in monthly installments in accordance with leased space beginning on November 1, 1941, and on the first day of each consecutive month thereafter to and including October 1, 1944; and to quit and deliver up the premises to the Lessor, peaceably and quietly, at the end of the term, in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are, or may be put into by the said Lessor, and to pay the rent as above stated during the term, and also the rent as above stated for such further time as the Lessee may hold the same, and not make or suffer any waste thereof; nor sublease, nor underlet, nor assign this lease, nor permit any other person or persons to occupy or improve the same, or make or suffer to be made any alternative therein, but with the approbation of the Lessor thereto, in writing, having been first obtained; and that the Lessor may enter to view and make improvements.

PROVIDED ALSO, and these presents are upon this condition, that if the Lessee shall neglect or fail to perform or observe any of the covenants contained in these presents, and on its part to be performed or observed, or if the estate hereby created shall be taken on execution, or by other process of law, or if the Lessee shall be declared bankrupt or insolvent according to law, or if any assignment shall be made of its property for the benefit of creditors, then, and in any of the said cases (notwithstanding any license of any former breach of covenant or waiver of the benefit hereof or consent in a former instance), the Lessor lawfully may, immediately, or at any time thereafter, and without demand or notice, enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same

as of its former estate, and expel the Lessee and those claiming through or under it and remove its effects (forcibly, if
 34 necessary) without being deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid this lease shall determine; and the Lessee covenants that in case of such termination, it will indemnify the Lessor against all loss of rent and other payments which it may incur by reason of such termination during the residue of the time first above specified for the duration of the said term; and that the Lessor may expel the Lessee if it shall fail to pay the rent as aforesaid or make or suffer any strip or waste thereof.

And provided also, that in case the premises, or any part thereof during the said term, be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then, and in such case, the rent hereinbefore reserved, or a just and proportional part thereof, according to the nature and extent of the injuries sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation by the said Lessor, or these presents shall thereby be determined and ended at the election of the said Lessor or its legal representatives.

Lessor shall heat the premises sufficiently to prevent freezing of the sprinklers and, in any event, to a minimum temperature of 60° F. with outside temperature of 0° F.

Lessee shall have the right to install and attach any machinery and equipment it desires to install, all of which shall remain its property and may be removed by it upon the termination of this Lease by expiration of the term or otherwise.

Lessee shall have the right to install loading platforms, to remove brick work, windows, floorings, and to make other structural alterations to provide handling facilities suitable and
 35 convenient to Lessee, in which event Lessee shall restore the premises at the expiration of this Lease to their original structural condition, ordinary wear and tear excepted.

Lessee shall have the right to enter the premises at any time during the term of this Lease, including access for trucks.

Lessor shall provide elevator service adequate for the use of the Lessee at a cost not to exceed twenty-two per cent (22%) of the Lessor's elevator operating cost, such service to be performed only as requested by the lessor.

In witness whereof the said parties have hereunto interchangeably set their hands and seals the day and year first above written.

HODGES CARPET COMPANY,

By (S) WINSON B. DAY, *Lessor*.

WESTINGHOUSE ELECTRIC &
MANUFACTURING COMPANY,

By (S) W. G. MARSHALL, *Lessee*.

Signed and sealed in presence of:

Original signed by

H. A. MACDOUGAL.

(S) A. N. CUNNINGHAM.

In United States District Court.

OPINION

June 12, 1947

SWEENEY, J. In this action the Westinghouse Electric Corporation seeks to recover from the petitioner just compensation for the taking of its leasehold rights to occupy the premises in question. The petitioner denies its liability to pay just compensation to this claimant, basing its decision upon the fact that it took the entire interest which the Corporation had in the lease, even though it took it piece by piece.

FINDINGS OF FACT

The parties hereto have filed an agreed statement of facts, including the amount of damages, if any, which the Court adopts as its findings of fact. The effect of the stipulation is to leave open only a simple question of law. That question is as follows: "Is Westinghouse Electric Corporation entitled to recover from the United States of America the sum of \$25,600.00 as the value of its occupancy under a lease of the premises in question?" Stated succinctly, the facts are these:

On February 18, 1943, the Corporation occupied the property under a lease which was to expire late in 1944. At that time the government, by a petition for condemnation, acquired the use and occupancy of the leased premises for the stated period from February 18, 1943, to June 30, 1943, with the right to renew said term for successive annual periods during the existence of the war emergency. Immediate possession of the property was given to the government. The right of renewal was exercised on or about June 30, 1943, for a period of one year, and it was again exercised on or about June 30, 1944. By the exercise of these options the entire leasehold was taken. The Corporation contends that *United States v. General Motors Corp.*, 323 U. S. 373,

is decisive of this case. It urges that the General Motors taking, as amended after judgment in the lower court, is on all fours with the government's taking in the instant case. If further urges that the value of the interest taken, on the day that it is taken, is the measure of its right to recovery. The government contends that the decision in *United States v. Petty Motor Co.*, 327 U. S. 372, fixes the law in this case. I do not consider the taking in the

Petty case analogous to the taking in the instant case for, while it reached the same result, the original taking in the

Petty case was for the entire balance of the term of the lease, with an option to surrender earlier. I think that this case must be governed by the decision in the General Motors case. I doubt that the fact that the government has exercised its option sufficiently to wipe out the balance of the Corporation's lease can have any effect upon the claimant's right to recover for its interest in the leasehold.

On February 18, 1943, the Corporation possessed a leasehold which had some value. The government did not elect to take the entire term of the lease in one taking, nor did it go so far as it did in the Petty case to take the entire balance of the term, with a right to early cancellation. It did exactly what was done in the General Motors case; that is, it took a portion of the term with the option for annual renewals. The tenant's right to just compensation arose on that day. I cannot believe that a tenant's right to just compensation for an interest taken can be defeated by the government's taking successive bites at the remainder so as to consume the whole eventually. If the government had taken three definite terms in three separate condemnation proceedings, there would be no question that they would be liable under the General Motors decision. I doubt if the tenant's rights can be defeated by the use of one condemnation proceeding with the option to take the balance piece by piece.

CONCLUSIONS OF LAW

From the foregoing I conclude and rule that the Westinghouse Electric Corporation is entitled to judgment against the United States in the sum of \$25,600.00.

In United States District Court

Judgment as to parcel A

November 24, 1947

SWEENEY, J. The above-entitled proceeding came duly on for hearing on Stipulation of Agreed Facts and Issues of Law entered into by all parties in interest, represented by their respective counsel, before this Court without a jury on

May 29, 1947, at a term of this Court holden at Boston, County of Suffolk, Commonwealth of Massachusetts, within the jurisdiction of this Court aforesaid, the United States of America by its attorney, and the respondents, Hodges Carpet Company and Westinghouse Electric and Manufacturing Company, by their attorneys, being the parties interested therein announcing ready for hearing, the Court proceeded to hear arguments thereon.

The cause having been duly tried on May 29, 1947, the Court by an Opinion entered in this Court on June 12, 1947, ruled that the Westinghouse Electric and Manufacturing Company is entitled to Judgment against the United States of America in the sum of Twenty Five Thousand Six Hundred and 00/100 Dollars (\$25,600.00) inclusive of interest; that pursuant to Paragraph 6 of the aforesaid Stipulation of Agreed Facts and Issues of Law, and the ruling of the Court, the Court finds that the value of the land and all title and interest therein, including all lawful damages sustained by the owners thereof, and all other persons, corporations or associations or parties having any lawful interests in said land, estimating the same as an entire estate, and as if all lawful damages accruing to the owners and other persons interested therein, by reason of the condemnation thereof, to the uses of the United States, were the sole property of the owner in fee simple, is One Hundred Forty Six Thousand Six Hundred Forty Five and 78/100 Dollars (\$146,645.78), inclusive of interest.

The United States of America having heretofore filed a Declaration of Taking and amendments thereto, pursuant to the statutes in such case made and provided, deposited certain monies
 39 as estimated just compensation for the taking of the temporary use and occupancy of the aforesaid land described in the Petition for Condemnation and Declarations of Taking filed in the above-entitled proceeding.

It is ordered, adjudged and decreed: That as to the aforesaid land, the total just compensation due therefor, is the sum of One Hundred Forty Six Thousand, Six Hundred Forty Five and 78/100 Dollars (\$146,645.78), and the same is hereby fixed at said sum; of which the sum of \$121,045.78 represents the total rental value thereof awarded to the Hodges Carpet Company as owner, and the sum of \$25,600.00 being the cost of removal received by Westinghouse Electric and Manufacturing Company as tenant of a portion of the premises and awarded as the value of the occupancy of the Westinghouse Electric and Manufacturing Company under its lease; that there has heretofore been deposited as estimated just compensation therefor the sum of One Hundred Twenty One Thousand, Forty Five and 78/100 Dollars (\$121,045.78), and by reason of the finding aforesaid, the owners and claimants of the above land do have and recover from the United States of

America as and for just compensation for the condemnation of the aforesaid land, a deficiency judgment in the sum of Twenty Five Thousand, Six Hundred and 00/100 Dollars (\$25,600.00), without interest thereon.

By the Court:

Entered:
11-24-47.

JANE D. FAHEY,
Deputy Clerk.
GEO. C. SWEENEY, J.

In United States District Court

Notice of appeal

Filed February 19, 1948

Notice is hereby given that the United States of America hereby appeals to the United States Circuit Court of Appeals for the First Circuit from that portion of the judgment entered in this Court on November 24, 1947 as pertains to the Westinghouse Electric and Manufacturing Co.

UNITED STATES OF AMERICA,
WILLIAM T. MCCARTHY,

United States Attorney.

By PHILIP P. A. O'CONNELL,
Special Assistant to the United States Attorney.

Statement of points to be relied upon on appeal

Filed February 24, 1948

The United States of America, appellant in the above entitled case, states that the following points will be relied upon on the appeal herein:

The district court erred:

1. In holding that the expenses of removal of Westinghouse Electric Corporation from the premises might be considered in determining compensation to which it was entitled.

2. In holding that the decision in United States v. General Motors Corp., 323 U. S. 373, is controlling in this proceeding.

3. In determining the issue of law in favor of Westinghouse Electric Corporation.

4. In entering the judgment of November 24, 1947.

UNITED STATES OF AMERICA,
Appellant.

WILLIAM T. MCCARTHY,
United States Attorney.

By PHILIP P. A. O'CONNELL,
Special Assistant to the United States Attorney.

41 In United States District Court

Designation of record on appeal

Filed February 24, 1948

The United States of America, appellant in the above-entitled case, designates the following for the record on appeal:

- | | |
|---|-------------------|
| | Filed |
| 1. Petition for condemnation, omitting schedules attached thereto | February 18, 1943 |
| 2. Order for possession, omitting scheduled attached thereto | February 18, 1943 |
| 3. Declaration of taking, omitting schedules attached thereto | April 16, 1943 |
| 4. Judgment on declaration of taking, omitting schedules attached thereto | April 16, 1943 |
| 5. Amended petition for condemnation, omitting schedules attached thereto | April 19, 1943 |
| 6. Election to extend term for years | May 1, 1943 |
| 7. Supplemental declaration of taking, omitting schedule attached thereto | August 23, 1943 |
| 8. Judgment on supplemental declaration of taking | October 22, 1943 |
| 9. Election to extend term for years | May 25, 1944 |
| 10. Supplemental declaration of taking, omitting schedule attached thereto | August 2, 1944 |
| 11. Judgment on declaration of taking | August 2, 1944 |
| 12. Stipulation of agreed facts and issues of law, including exhibit attached thereto | |
| 13. Opinion | June 12, 1947 |
| 14. Judgment as to Parcel A | November 24, 1947 |
| 15. Notice of appeal | February 19, 1948 |
| 42 16. Appellant's statement of points | February 24, 1948 |
| 17. This designation | February 24, 1948 |

UNITED STATES OF AMERICA,

Appellant.

WILLIAM T. MCCARTHY,

United States Attorney.

By PHILIP P. A. O'CONNELL,

Special Assistant to the United States Attorney.

43 [Clerk's Certificate to foregoing transcript omitted in printing.]

[Memorandum: Order of enlargement of time for docketing case to, and including, April 29, 1948, is here omitted. Roger A. Stinchfield, Clerk.]

PROCEEDINGS IN COURT OF APPEALS

On October 4, 1948, this cause came on to be heard, and was fully heard by the Court, Honorable Calvert Magruder, Chief Judge, and Honorable Herbert F. Goodrich (by special assignment) and Honorable Peter Woodbury, Circuit Judges, sitting.

This cause was thence continued under advisement to the present term of October, in the year of our Lord one thousand nine hundred and forty-eight.

On November 23, 1948, the following opinion of the Court and dissenting opinion were filed:

UNITED STATES COURT OF APPEALS FOR THE FIRST
CIRCUIT

October Term, 1948

No. 4353

UNITED STATES OF AMERICA, PETITIONER, APPELLANT

v.

WESTINGHOUSE ELECTRIC & MANUFACTURING CO., APPELLEE

Appeal from the District Court of the United States for the District
of Massachusetts

[71 F. Supp. 1001]

Before MAGRUDER, Chief Judge, GOODRICH and WOODBURY, Circuit
Judges

JOHN F. COTTER, Attorney, Department of Justice, with whom
A. DEVITT VANECH, Assistant Attorney General, and WILLIAM
T. MCCARTHY, United States Attorney, were on brief for appel-
lant.

MILTON J. DONOVAN for appellee.

OPINION OF THE COURT

November 23, 1948

WOODBURY, *Circuit Judge*. This is an appeal by the United States from so much of a final judgment entered in proceedings brought for the condemnation of the temporary use and occupancy of a parcel

of land with the buildings thereon as awarded removal costs in the stipulated amount of \$25,600 to Westinghouse Electric and Manufacturing Company, the lessee of a portion of the premises condemned. The question presented here was not directly considered by the Supreme Court in either *United States v. General Motors Corp.*, 323 U. S. 373, or in *United States v. Petty Motor Co.*, 327 U. S. 372. It is whether costs of removal may properly be considered as elements of a lessee's damage when the United States condemns the use and occupancy of leased premises for an original period less than the remainder of the lessee's term but with options to extend, and then exercises those options to prolong its use and occupancy beyond the lessee's term. The facts which give rise to this question have been stipulated.

On February 18, 1943, the United States filed a petition in the court below under the Second War Powers Act of March 27, 1942, 56 Stat. 176, 177, and other statutes, for the condemnation of certain warehouse property in Springfield, Massachusetts, part of which was occupied at the time by the Westinghouse Electric and Manufacturing Company under a lease expiring on October 30, 1944. The petition for condemnation recited "That the interest to be acquired is a term for years ending June 30, 1943, subject to existing easements . . . , said term being renewable for additional yearly periods during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof." The United States was granted immediate possession of the premises and Westinghouse moved to another location. The parties have stipulated that Westinghouse "in so doing incurred certain costs and expenses of removal of its personal property aggregating the sum of Twenty-Five Thousand, Six Hundred and 00/100 Dollars (\$25,600.00) which it is agreed represents the full and complete claim for compensation of said lessee against the United States of America on behalf of, or arising under the lease of the Westinghouse Electric Corporation." It is further stipulated that had the parties proceeded to trial witnesses for Westinghouse would testify that the above amount was actually expended by it "for the cost and expenses of labor, material, and transportation in moving its property from the location in question to a new location," and that the expense incurred was necessary, fair and reasonable "for such removal."

On May 1, 1943, the Secretary of War exercised the right to renew the term of the taking to June 30, 1944, and on May 25, 1944, he exercised the right to renew the term to June 30, 1945, thereby extending the Government's occupation eight months beyond the expiration date of the Westinghouse lease. The United States deposited estimated just compensation for the original taking and for

each extension thereof in the gross amount of \$121,045.78. It is stipulated that this amount "represents the fair market rental value of the bare unheated warehouse space taken and, if upon the facts and evidence agreed, if admissible, Westinghouse Electric Corporation is entitled to recover for the loss of its right to occupy under its lease as a matter of law, ~~then a finding~~ should be entered determining the just compensation to be in the sum of One Hundred Forty-Six Thousand, Six Hundred Forty-Five and 78/100 Dollars (\$146,645.78), inclusive of interest, and an order be entered disbursing the sum of Twenty-Five Thousand, Six Hundred and 00/100 Dollars (\$25,600.00) to Westinghouse Electric Corporation, and the sum of One Hundred Twenty-One Thousand, Forty-Five and 78/100 Dollars (\$121,045.78), being the total amount of the deposits," to Westinghouse's lessor, the owner in fee.

It is further stipulated that no "factual matters" other than those agreed upon remain to be determined and that "the sole issue of law" which they present is whether Westinghouse is "entitled to recover from the United States of America the sum of Twenty-Five Thousand, Six Hundred and 00/100 Dollars (\$25,600.00) as the value of its occupancy under the lease upon the foregoing facts and evidence?" The District Court, considering the *General Motors* case *supra*, controlling, entered judgment for Westinghouse in accordance with the stipulation and the United States thereupon took this appeal.

In the *General Motors* case the question considered by both the Circuit Court of Appeals¹ and the Supreme Court was whether the District Court had erred in excluding evidence of a lessee's costs of removal at the trial by jury of the issue of the amount of the lessee's just compensation in a condemnation case wherein the use condemned was for a period of one year and no more out of a lease having approximately six more years to run. Both courts answered this question in the affirmative, holding that under the circumstances presented actual, necessary and reasonable costs of removal might be proved by a lessee, not as independent items of damage, but as elements to be considered in determining the amount of the just compensation required by the Fifth Amendment, i.e. the price which would be willingly asked and paid for the temporary interest which the Government had condemned.

In reaching this result the Supreme Court was careful to point out that it approved, and was not to be taken as departing from, the general rule that consequential losses are "not to be reckoned as part of the compensation" due an owner when the fee is taken. It said the question posed in the case before it was "shall a different measure of compensation apply where that which is taken is a right of temporary occupancy of a building equipped for the condemnee's busi-

¹ 140 F. (2nd) 873.

ness, filled with his commodities, and presumably to be reoccupied and used, as before, to the end of the lease term on the termination of the Government's use?" *id.* 379, 380.

In answering this question in the affirmative the Supreme Court first pointed out that whenever the Government takes an owner's property "that is, the fee, the lease, whatever he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases." But the court goes on to say that "It is altogether another matter when the Government does not take his entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the 'market rental value' for the use of the chips so cut off. This is neither the 'taking' nor the 'just compensation' the Fifth Amendment contemplates. The value of such an occupancy is to be ascertained, not by treating what is taken as an empty warehouse to be leased for a long term, but what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier. The case should be retried on this principal." *id.* 382. Following this the court says that "Some of the elements which would certainly and directly affect the market price agreed upon by a tenant and a sublessee in such an extraordinary and unusual transaction would be the reasonable cost of moving out the property stored and preparing the space for occupancy by the subtenant," and consequently the court reaches its conclusion that "Such items may be proved, not as independent items of damage but to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy of the building then in use under a long-term lease."

From the foregoing it seems evident that the Supreme Court based its conclusion in the *General Motors* case primarily, if not entirely, upon the fact that since the use condemned by the Government was for a period of only one year out of an unexpired lease of approximately six years, the ousted tenant was under the obligation of returning to, or at least was responsible for the rent for, the leased premises for the balance of the term of the lease remaining after the termination of the Government's use.

But in the *General Motors* case both the Circuit Court of Appeals and the Supreme Court adverted in footnotes of the fact that subsequent to the entry of the judgment appealed from, the District Court on the Government's motion had opened the judgment and allowed the Government to amend its petition for condemnation to enlarge the interest taken by making the original term for years expiring on a given date "renewable for additional yearly periods thereafter

... at the election of the Secretary of War" on the giving of a specified notice of intent to renew, and then had entered a new judgment in the amount of the verdict and had continued its jurisdiction for the ascertainment of further compensation for damage to the property, if any such damage should accrue. Thus, although the Supreme Court said that the amendment of the complaint in the above case did not alter the question the case presented, nevertheless it must have been well aware of the fact that in ordering the case retried on the principles which it was announcing, it was ordering the admission of evidence of a tenant's removal costs at the trial of a petition for condemnation which by amendment had become similar to the one in the case at bar with respect to the description of the interest taken, i.e., at the trial of a condemnation case in which the use taken by the Government, if renewed, might outlast the lessee's tenancy. From this we can only assume that the Supreme Court intended its decision in the *General Motors* case to rule the situation presented in the instant one.

Further confirmation for this view is to be found in the footnote in the above case already alluded to in which the Supreme Court refers to the amendment of the judgment appealed from. For, after saying that the amendment did not "alter the question" before it, and that "The case now presented involves only the original taking for one year," the court immediately goes on to say: "If, on the remand, the case be treated as involving the Government's option of renewal, the additional value of that interest must be included in the compensation awarded."

And we find nothing militating against this view in the opinion of the court in the *Petty Motor* case, *supra*. Indeed we find support for it in the concurring opinion in that case.

In the *Petty Motor* case the Supreme Court was confronted with the question of the admissibility of evidence of a lessee's costs of removal at the trial of a petition for condemnation whereby the Government had taken the use of certain premises through June 30, 1945, with the right to surrender them on either June 30, 1943, or June 30, 1944, upon giving the owner sixty days written notice, the first of these surrender dates being within the term of an outstanding lease of the premises and the second within the term of an option of renewal contained in the lease. In this situation the Supreme Court held that the rule it had announced in the *General Motors* case did not apply. It said that "Although an earlier surrender might occur by the election of the United States, the estate sought did not necessarily expire until June 30, 1945." p. 374. This, it concluded "resulted in the taking by the United States of the temporary use of the building until June 30, 1945," for, it continued, "When the shortening of the term is wholly at the election of the lessee, the term of the leasehold for the purpose of determining the extent of the taking

must be considered to be its longest limit." p. 375. Therefore it concluded that there had been "a complete taking of the entire interest of the tenants in the property" and then it said: "We think the sounder rule under the federal statutes is to treat the condemnation of all interests in a leasehold like the condemnation of all interests in the fee. In neither situation should evidence of the cost of removal or relocation be admitted. Such costs are apart from the value of the thing taken. They are personal to the lessee."

Then the court distinguished the *General Motors* case on the ground that "In it only a portion of the lease was taken," and, it continued "There is a fundamental difference between the taking of a part of a lease and the taking of the whole lease. That difference is that the lessee must return to the leasehold at the end of the Government's use or at least the responsibility for the period of the lease which is not taken rests upon the lessee. This was brought out in the *General Motors* decision. Because of that continuing obligation in all takings of temporary occupancy of leaseholds, the value of the rights of the lessees which are taken may be affected by evidence of the cost of temporary removal."

Taken together the two cases we have discussed and quoted from clearly establish that although a tenant's removal costs may never be proved "as independent items of damage," they must be considered "to aid in the determination" of the amount of just compensation which the Government under the Fifth Amendment must pay to a tenant when a part only of his leasehold interest is taken but are not to be considered when his entire interest is expropriated. The problem before us is to determine whether the Government in the case at bar took the tenant's entire interest or only a part of it. We have concluded that only part of the interest had been taken and thus we agree with the District Court that the rule of the *General Motors* case applies.

And Mr. Justice Rutledge concurring in the *Petty Motor* case takes the same view. After pointing out that in the *General Motors* case "the Court applied a rule of compensation to the case of carving out a temporary or short-term use from a longer term very different from that generally applicable when the owner's entire interest is taken," and that "The purpose and the basis for this were to give substance, in practical effect, to the Amendment's explicit mandate for payment of 'just compensation' in cases of such extraordinary 'takings' and to prevent those words from being whittled down by legalistic construction into means for practical confiscation," he expresses doubts, but accepts, the Court's construction that in the *Petty Motor* case the Government condemned the tenant's "entire leasehold interest in the premises and therefore must pay the full value of that term according to the usual rules in such cases." Then he discusses the rule of the *General Motors* case and the rule adopted

by the court in the *Petty Motor* case, and referring to the Government's option to surrender in the latter case continues as follows:

"It is this option which I think makes dubious the ruling that all of the *Petty Motor Company's* interest was 'taken.' In my opinion it was only 'taken' contingently. For, if the option is valid, quite obviously the Government was free to surrender, by giving notice, on June 30, 1943, in which event *Petty's* lease would have been in force until the following October 31 in any event, or on June 30, 1944, in which case *Petty's* lease might have continued in force until October 31, 1944. In either event the case would have fallen squarely within the *General Motors* situation and ruling.

"In my opinion that ruling and the requirement of paying compensation according to the measure it prescribes apply whether the Government carves out part of the tenant-owner's term by one method of stating what it takes or another. That is, for this purpose, it makes no difference whether the Government 'takes' the temporary use for part of the term but adds to this a right of renewal periodically which if exercised will extend the term taken beyond the term of the lease; or, on the other hand, purports to take a term which extends beyond that of the leasehold interest, but reserves the right to cut this down periodically so that in fact it may surrender the premises before the leasehold expires and thus carve out of it a shorter term, just as in the *General Motors* taking.

"Whether the chopping up is accomplished one way or the other, the effects for the owner are the same, the 'taking' is in substance the same, and the compensation is required, under the *General Motors* decision, to be the same. That ruling cannot be avoided by inverting the length of the term specified and, correlatively, the character of the option added. Nor can it be avoided by construing the term taken, in view of the contingent option, in cases of the *Petty* type as including all of the interest of the lessee, if in fact the Government exercises the option and surrenders the premises before the lessee's term expires. Upon such a showing the *General Motors* rule would apply and the owner-lessee would be entitled to recover compensation including all of the elements specified in that rule, subject only to making proof of them."

The foregoing analysis seems to us to indicate that the rule of the *General Motors* case applies when the Government has described the interest which it is taking as a term for years annually renewable at its option. In applying it, however, we recognize that the way is now open for the Government to avoid any possibility of liability for removal costs by the simple expedient of "chopping up" the tenant's

interest as it did in the *Petty Motor* case rather than as it did in the *General Motors* case. Perhaps, since in all cases wherein the Government takes a temporary use for an indefinite period the district court having jurisdiction must of necessity retain its jurisdiction until the actual termination of the Government's use in order finally to determine the whole amount of damage incurred, the problem could be solved by directing the district courts to hold the question of removal costs as elements of a tenant's damage in abeyance until final judgment so that they could be considered or disregarded depending upon whether in fact the Government's use did or did not outlast the tenant's lease. But we find no sanction for this procedure in either of the Supreme Court cases considered, and this omission we think highly significant.

The judgment of the District Court is affirmed.

MAGRUDER, Chief Judge, (dissenting). The teaching of *United States v. General Motors Corp.*, 323 U. S. 373 (1945), and *United States v. Petty Motor Co.*, 327 U. S. 372 (1946), may perhaps not be entirely clear. But it seems to me that the logical inference from those decisions points to the opposite conclusion from that arrived at in the opinion of the court in the case at bar.

Where the United States takes the entire fee in condemnation proceedings, the settled rule as to just compensation for the interest taken is stated in the *General Motors* case as follows (323 U. S. at 379-80):

"The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of goodwill which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell. No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the Government. We are not to be taken as departing from the rule they have laid down, which we think sound."

Likewise, where the taking is of a term for years which completely extinguishes an existing leasehold interest, it is error to admit evidence by the tenant of his costs of moving and reinstallation of equipment on the issue as to the amount of compensation payable to him. *United States v. Petty Motor Co.*, *supra*. In such a case

the measure of compensation is the value of the use and occupancy of the leasehold for the remainder of the tenant's term, less the amount of the rent which the tenant agreed to pay for such use and occupancy. 327 U. S. at 381.

An exceptional situation is presented where the Government takes a term for years for a period less than the unexpired portion of an existing leasehold. As to the appropriateness here of receiving evidence of the tenant's removal expenses, the tenant in its brief in the *General Motors* case urged upon the Supreme Court this equitable consideration: "As the situation in this case actually stands, however, the condemnation for the temporary use of only one year means that, instead of moving out once and for all, in 1942 rather than six years later, respondent is obliged, by force of its obligation for the balance of the lease term, to move back again in order to reoccupy the property upon termination of the Government's temporary use, and then move out again several years later by reason of the expiration of the lease." That this seems definitely to have been the moving consideration in the *General Motors* decision appears from the explanation of that case in *United States v. Petty Motor Co.*, 327 U. S. at 379-80.

In the present case the United States filed a single petition for condemnation describing the interest to be acquired as a term for years ending June 30, 1943, said term being renewable upon notice for additional yearly periods during the existing national emergency at the election of the Secretary of War. Of necessity, in such a condemnation proceeding, the final determination of the just compensation must abide the event, because until it is known whether and to what extent the Government's option to renew is to be exercised, the extent of the ultimate taking under the condemnation petition cannot be known. Here, before the court below entered the judgment now under review, the United States by exercise of its option of renewal had extended the term of the taking beyond the remaining period of Westinghouse's lease. It thus conclusively appeared that Westinghouse would not have the burden of moving out during the period of the Government's temporary occupancy and then moving back for the balance of the term of its leasehold—which, as we have seen, was the important factor in the *General Motors* case. Therefore it seems to me that, at the time the district court gave judgment here, the case stood just as if the Government had originally taken a term for a period expiring June 30, 1945, which was longer than the unexpired portion of Westinghouse's lease. *United States v. Petty Motor Co.* is authority for the point that in such a case evidence of the tenant's removal costs is inadmissible on the issue of the value of the tenant's leasehold interest extinguished by the taking.

In the *General Motors* case, the original petition for condemnation was for a term of a year only. The case was tried on this basis in the

district court, and evidence of the tenant's removal expenses was excluded. The case was argued in the circuit court of appeals and in the Supreme Court on the same basis, and both appellate courts held that the trial court was in error in excluding evidence of removal costs. The case therefore had to go back for a new trial. It is true, as both appellate courts noted, that after the district court had entered judgment on the verdict it allowed the Government to amend its petition for condemnation so as to add an option of renewal for additional yearly periods at the election of the Secretary of War. But it does not appear from the record in the *General Motors* case whether the Government ever exercised its option to extend the term beyond the one year originally taken. For all we know, it never did; and if that is what happened, then the district court upon the retrial would have been obliged to receive evidence of the tenant's costs of removal as directed by the Supreme Court. But if, after the remand, it should have appeared that the Government had exercised its option of renewal and was still in possession, I suppose the issue of compensation to General Motors would have stood in abeyance until it was determined whether the United States was going to stay in possession beyond the remaining portion of General Motors' lease. And if the fact was at the time of the retrial that the taking by the United States had completely extinguished the leasehold interest of General Motors, then the decision in *United States v. General Motors Corp.*, *supra*, as to admissibility of evidence of removal costs, was no longer controlling, for it was directed to quite a different situation. Cf. Rutledge, J., concurring, in *United States v. Petty Motor Co.*, *supra*.

One further consideration is puzzling to me. Where the United States condemns a term for a period less than the unexpired portion of an existing leasehold, the decision in the *General Motors* case does not say that the tenant is entitled to removal expenses as an independent item of damage, but only that evidence of such removal expenses is admissible "to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy of the building then in use under a long-term lease." (P. 383.) How much this factor might affect such market value is somewhat conjectural, but presumably it would be taken into account by an expert appraisal. When the United States takes, not a fixed term merely, but a term of a year with the option of renewal for successive annual terms, the tenant cannot know at the time of the original taking whether the condemnation proceeding will ultimately extinguish the whole of his unexpired leasehold, or whether he will be faced with the situation of the tenant in the *General Motors* case, namely, the taking of only a portion of the leasehold interest, putting the tenant to the necessity of moving out during the temporary period of Government occupancy and moving back for the remaining period of the leasehold after the Government

has relinquished possession. Therefore, it might be suggested that, in the case at bar, the matter should be looked at as of the time of the original taking; that the *chance* of having to move back would be a factor bearing on the rental which a willing sublessor and a willing sublessee would agree upon for a sublease of this indefinite duration; and hence that evidence of removal costs should be admissible on the issue of just compensation for the interest taken, regardless of whether the Government, by successive renewals, ultimately extinguishes the whole interest of the tenant. But this suggestion runs counter to what was actually done in *United States v. Petty Motor Co.*, *supra*. In that case, the Government's petition for condemnation was for a term of years expiring June 30, 1945, reserving to the Government the right of election to surrender possession on June 30, 1943, or June 30, 1944, upon giving sixty days' written notice. At the time of the taking, Petty Motor Company held a lease on the premises expiring October 31, 1943, with an option for an additional year. At the time of the original taking, therefore, the tenant could not know whether the Government was going to occupy the premises for the full unexpired period of the tenant's lease, or whether the Government by exercise of its surrender option was going to relinquish possession while a portion of the tenant's leasehold was still unexpired. It does not appear what the Government ultimately did in that respect. Nevertheless, the Supreme Court held that it was error for the trial court to receive evidence of the tenant's costs of moving and reinstallation of equipment on the issue of the value of the interest taken.

I think it is fair to say that neither my brethren nor I have complete confidence that we have drawn the correct inferences from the *General Motors* and *Petty* cases in aid of the contrary conclusions we have reached in our respective opinions. For that reason, it would not be unwelcome if the Supreme Court found an early occasion to review the whole matter.

PROCEEDINGS IN COURT OF APPEALS

On the same day, November 23, 1948, the following judgment was entered:

JUDGMENT

November 23, 1948

This cause came on to be heard on the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(S.) ROGER A. STINCHFIELD, *Clerk*

Thereafter, on December 9, 1948, mandate issued.

CLERK'S CERTIFICATE

I, Roger A. Stinchfield, Clerk of the United States Court of Appeals (formerly Circuit Court of Appeals) for the First Circuit, certify that the foregoing pages, numbered 1 to 61, inclusive, contain and are a true copy of the record and all proceedings in said Court to and including February 15, 1949, in the cause numbered and entitled, No. 4353, United States of America, Petitioner, Appellant, versus Westinghouse Electric & Manufacturing Co., Appellee.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Court of Appeals for the First Circuit, at Boston, Massachusetts, in said First Circuit, this fifteenth day of February, A. D. 1949.

[SEAL]

ROGER A. STINCHFIELD, Clerk.

Supreme Court of the United States

Order allowing certiorari.

Filed April 18, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.